No. 87-1607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARRY SILVERSTEIN AND DENNIS J. MCGILLICUDDY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Brief for the United States in Opposition to the petition for certiorari ("Opp.") provides no support for the court of appeals' decision and fails to resolve the conflict between that decision and precedent from this Court and the other courts of appeals.[1] Accordingly, the

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[1] Moreover, the government does not dispute that an important question of federal law is in issue. That importance stems especially from the effect of the court of appeals' decision on enforcement of the ethical duties prescribed by the ABA's Model Rules of Professional Conduct (as incorporated in the rules of the various federal district courts), and the problems the decision creates for

writ should be granted, and this Court should decide whether Article III precludes a federal court from adjudicating a motion to disqualify counsel involved in a pending grand jury proceeding before the actual harm that the motion seeks to prevent has occurred.

ARGUMENT

The government contends that Article III prevents federal courts from correcting ethical violations of government counsel before a grand jury unless "coercive action" has been taken against the complainant. (Opp. 3). The decisions of this Court mandate no such delay in righting the wrongs or threatened wrongs of prosecutors; to the contrary, as the cases cited by petitioners demonstrate, Article III empowers federal courts to correct such violations prophylactically.[2]

In support of its "coercive action" theory, the government relies on *Laird v. Tatum*, 408 U.S. 1 (1972), which it claims has "great force" in this context. (Opp. 3) But the facts and legal principles at issue in *Laird* are quite different from those present here. In *Laird*, the petitioners claimed that investigative and data-gathering activity by the Army was chilling their speech and thus violating their First Amendment rights. Their claim did not constitute an Article III case or controversy, the Court held, because they did not allege that *they* were currently being investigated by the Army or were even likely to be investigated in the future; instead they ar-

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federal prosecutors seeking to disqualify attorneys representing multiple witnesses before a grand jury. *See* Pet. 6-7.

[2] Article III requires:

> that a plaintiff allege he has suffered actual or threatened injury at the hands of the defendant, fairly traceable to the unlawful conduct, and likely to be redressed by the requested relief.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982) (citations omitted).

gued that their rights were "being chilled by the mere existence, without more," of the Army's activity—that is, that their knowledge that *others* were being investigated chilled their speech. *Id.* at 10.

In contrast to *Laird*, and as demonstrated in the petition, the actions of the particular United States Attorney involved in this case—branding petitioners as wrongdoers on the public record, investigating one of petitioners after having had access to his immunized testimony, unilaterally abrogating the government's immunity agreement with one of the petitioners, and subpoenaing petitioners before the special grand jury—were all directed at petitioners.[3]

Thus, without any pertinent authority, the government claims that federal courts are virtually powerless to review pre-indictment conduct by a federal prosecutor. The government's argument rests on the claim that "[t]he United States Attorney, like the grand jury, 'must be free to pursue [his] investigations unhindered by external influence or supervision.' *United States v. Dionisio*, 410 U.S. 1, 17 (1973)." (Opp. 4) But a complete reading of the *Dionisio* passage shows that this Court placed its trust in the *grand jury*, and *not* in the prosecutor. Nothing in *Dionisio* suggests that a federal prosecutor appearing before a grand jury is freed from the ethical constraints under which all other attorneys labor, or that challenges to his pre-indictment conduct are prevented by Article III.

Apart from its apparent attempt to free federal prosecutors before the grand jury from judicial enforcement of ethical constraints, the government argues that there is

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[3] *See* Pet. 3, 13a-14a. Petitioners' reading of *Laird*, and the distinction they draw between *Laird* and this case, have some precedent in this Court. *See Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1318-19 (1974) (Marshall, J., sitting as Circuit Justice on application for stay).

no conflict between the decision of the court below and decisions of other federal courts that have adjudicated grand jury disqualification motions. To this end, the government notes that only one of the cases cited by petitioners involved a motion to disqualify a prosecutor conducting a grand jury investigation (as opposed to counsel for a grand jury witness or for a target of the prosecutor) and that, even in that case, the court did not "discuss" whether the motion to disqualify presented an Article III controversy. (Opp. 5) For the reasons set out below, the government's attempt to reconcile the cases cited by petitioners with the court of appeals' decision in this case is unpersuasive.

First, the government provides no rationale or authority for ignoring those cases where a court disqualified private counsel, as opposed to prosecutors. As petitioners have noted, without rebuttal from the government, "there is no principled basis for distinguishing . . . between a prophylactic government motion to disqualify counsel for grand jury witnesses, and a prophylactic motion by a witness to disqualify government counsel." (Pet. 7) Deciding the *merits* of such motions may involve the weighing of different factors, but the process for deciding whether they present a case or controversy for Article III purposes is the same. The threatened injury from an alleged breach of an ethical rule is sufficient to invoke the power of the federal judiciary to decide whether the prophylactic remedy of disqualification is merited, whether it be disqualification of private counsel, a prosecutor, or other government counsel. Thus, the admonition of the court in *In re Gopman*, 531 F.2d 262 (5th Cir. 1976), that "[w]e . . . must remember that the court's discretion permits it 'to nip any potential conflict of interest in the bud,'" *id.* at 266 (quoting *Tucker v. Shaw*, 378 F.2d 304, 307 (2d Cir. 1967)), is equally applicable to this case. The court of appeals' decision therefore represents a break with precedent.

The government's attempt to distinguish *In re April 1977 Grand Jury Subpoenas*, 573 F.2d 936 (6th Cir. 1978), *appeal dism'd*, 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 934 (1979), is equally unavailing. The government notes that the court in that case did not discuss Article III. (Opp. 5) Federal courts, however, are obligated to examine whether they have jurisdiction—under Article III and otherwise—before proceeding to the merits of a case. "It is basic to our jurisprudence that 'the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it.'" *Marshall v. Local Union No. 639*, 593 F.2d 1297, 1301 n.16 (D.C. Cir. 1979) (quoting *Mansfield, Coldwater & Lake Michigan Ry. v. Swann*, 111 U.S. 379, 382 (1884)); *see Judice v. Vail*, 430 U.S. 327, 331 (1977). Therefore, the order terminating the grand jury investigation by the panel in *In re April 1977 Grand Jury Subpoenas* necessarily implied that the panel had determined that an Article III case or controversy was presented, and the action of the en banc court—in determining that there was no *statute* conferring *appellate* jurisdiction to review the district court's order denying disqualification of government counsel in the grand jury proceeding—necessarily presupposed that the district court had jurisdiction authorized by Article III to entertain and adjudicate the motion to disqualify.[4]

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[4] *See also In re Special February 1977 Grand Jury*, 581 F.2d 1262, 1263-65 (7th Cir. 1978); *In re Grand Jury Empanelled January 21, 1975*, 536 F.2d 1009, 1011-13 (3rd Cir. 1976). As in *In re April 1977 Grand Jury Subpoenas*, the fact that the courts in these cases adjudicated the procedural and substantive issues raised by the parties demonstrates the courts' belief that those issues presented a case or controversy under Article III.

CONCLUSION

For the foregoing reasons, and for the reasons advanced in their petition, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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